No. 10490

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO ~~FALLS~~ POTATO GROWERS ASSOCIATION AND IDAHO TRAFFIC ASSOCIATION, ET AL,

AND

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A.F.L.

BRIEF OF PETITIONERS

Upon Petition for Review and Petition for Enforcement of Order of the National Labor Relations Board

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UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
CASE NO. XIX-C-1116 ET AL.

STATEMENT OF PLEADINGS AND FACTS DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THE NATIONAL LABOR RELATIONS BOARD HAD JURISDICTION AND THAT THIS COURT HAS JURSIDICTION TO REVIEW THE ORDER OF THE BOARD.

The Petitioners, Respondents below, with the exception of the Idaho Traffic Association, are potato packers in the eastern section of the State of Idaho, and they

have contended from the beginning that the employees working for them are agricultural laborers and not subject to the National Labor Relations Act because of Section 2(3) of said Act, which is as follows:

> "When used in this Act * * *
>
> "(3) The term 'employee' shall include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse."

The petitioners also contend that any interference with the union, or violation of the National Labor Relations Act was caused by the farmers and growers, and not by these petitioners.

Petitioners also contend that the two employees that were laid off, were laid off on a temprary basis only, and that by custom and practice they knew, or should have known that it was their duty to apply for reinstatement; that they were offered re-employment but made no effort to return to work.

There is no substantial controversy to the facts, except as to certain details with reference to how

many of the petitioners raise their own potatoes and as to the amount of control exercised by the farmers over the packing of the potatoes and over the employees so engaged. The questions finally boil down as follows: (1) Are the employees working in these potato sheds engaged as agricultural laborers? (2) Are the petitioners excused from liability because of the activities of the farmers and growers in this area? (3) Were the employees discharged because of union affiliations or were they merely temporarily laid off due to lack of work?

The petitioners maintain that all of these questions should be answered in the affirmative. The respondent contends that they should be answered in the negative.

These questions were presented by a motion to dismiss (p. 82) by the answer (p. 60). The motion to dismiss was denied.

The material facts are few and simple and will be stated in logical order rather than in the order in which they appear in record.

Before giving a statement of facts, we summarize here our points:

POINT No. I

We believe the evidence shows in this case the employees engaged in these operations to be agricultural laborers.

POINT No. II

We believe that any violation of the National Labor Relations Act that may have occurred herein was caused by the activities and actions of the growers and farmers, and not these petitioners; that this entire problem is one involving agricultural labor on or in the vicinity of the farm.

POINT No. III

We believe the petitioners were justified in refusing to bargain with the union unless or until the union could prove representation of a majority of the employees.

POINT No. IV

We believe the employees, Milo Rash (Idaho Potato Growers, Inc.) and Willard Moore (L. S. Taube and Co.), were lawfully and temporarily laid off due to lack of work and their own inefficiency. These employees made no effort to return to discuss further employment or to improve their status as employees.

CONCISE ABSTRACT AND STATEMENT OF THE CASE PRESENTING SUCCINCTLY THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RAISED.

The petitioners have maintained from the beginning that while the petitioners are engaged in interstate commerce, nevertheless the National Labor Relations Board has no jurisdiction over either the petitioners or their employees, inasmuch as they are engaged in agriculture and the employees are agricultural laborers.

This action was started upon the filing of charges by the Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 983, A.F.L., alleging that the petitioners had committed certain unfair labor practices by interfering with the union, discharging of employees and refusing to bargain. To these charges the petitioners filed an answer denying the same and pleading that the employees involved were engaged in agricultural labor.

The petitioners also filed a motion to dismiss on the grounds that the National Labor Relations Board was without jurisdiction, inasmuch as the employees in-

volved were agricultural laborers. This motion was denied (p. 82).

The case was then heard before a trial examiner of the National Labor Relations Board, who made an intermediate report. The petitioners then argued the case before the National Labor Relations Board and that Board thereafter on the 10th day of April, 1943, ordered the Petitioners to, among other things: (1) Bargain with the union. (2) Make whole two employees, Milo Rash and Willard Moore, working for the Idaho Potato Growers, Inc., and L. S. Taube and Company, respectively. (3) Post the usual notices that petitioners would comply with the board's order.

This being a case under the National Labor Relations Act [29 U.S.C.A., Sec. 160, sub-section (f)], this Court has jurisdiction to review the order of the Board.

STATEMENT OF FACTS

Of the eight petitioners involved in this case, seven are what are commonly called "potato packers," operating potato warehouses where potatoes in their raw and natural state are sorted and packed in bags for shipment. All but two of the eight petitioners raise potatoes on their own farms, and by common practice a large percentage of the sorting and packing is performed in the farmers' cellars with all the packing under the control of the farmer. Most of the potatoes are purchased on the basis of U.S. No. 1 grade, and until the grade is made, the ownership of the potatoes remains in the grower.

One of the two remaining petitioners, the Idaho Falls Potato Growers, Inc., is a non-profit cooperative mar-

keting association organized under the usual cooperative marketing act, and set up for the purpose of marketing its members' potatoes. This petitioner has a large membership of growers and producers, and markets substantially more than any other individual packer. The remaining petitioners, the Idaho Traffic Association, is a trade organization, organized for the purpose of disseminating information pertaining to rates, freight charges, government regulations, etc., and has been in existence for several years last past.

Beginning with the latter part of December, 1941, the Teamsters, Chauffeurs, Warehousemen and Helpers Local 983, American Federation of Labor, hereinafter referred to as the "union," started a campaign to organize the workers working both in the warehouses and in the farmers' cellars, in the Idaho Falls area, and on February 13, 1942, by letter requested bargaining rights of the petitioners with the exception of the Traffic Association.

From the very beginning the farmers and growers gave notice to the petitioners that they (the growers) would not sell or consign their potatoes to these petitioners, if they had dealings with the union, and during this period, and up to April 15, 1943, numerous meetings of various kinds were held among all parties concerned, with very little, if any, progress made toward negotiations.

The Union did not, through certification, cross-check, or election, establish their right to bargain for the employees of the above-mentioned respondents. They were requested to do so by the respondents' representative (p. 315). This proof was finally submitted

at the time of the hearing about nine months after the request to bargain was made.

The shipment of potatoes from the area in which these petitioners are located (Idaho Falls, Idaho) ceases on or about May 1, each year, and a large percentage of the employees working in the warehouses return to the farms for the growing season. There was little or no contact or activity between May 1 and September 15, 1942, either on the part of the union or the employers. When the fall season started (September 15, 1942), a meeting was arranged between a committee from among the petitioners and representatives of the union. This meeting is described by both the petitioners and the union as a sincere constructive collective bargaining agreement (p. 450).

The petitioners have at all times contended that their employees are engaged as agricultural labor and therefore without the jurisdiction of the National Labor Relations Act.

There are two common methods of handling potatoes in the Idaho Falls area. Under one method, the packer purchases the potatoes outright, usually field run, and assumes the entire responsibility for packing the same, the grower paying for the packing indirectly in the price he receives for the potatoes. This method is unusual and represents perhaps 15-20 per cent depending upon the packers, the season, and the potatoes.

The second method and one most commonly adopted is to purchase the potatoes from the grower, U.S. Grade No. 1 made. Under this method, the grower retains control of the packing of the potatoes and ownership in them until the grade is made and approved by the

Inspector from the Department of Agriculture. Under this method the farmer sometimes recruits his own crew and sometimes specifies the crew he wants. The farmers at times pay for the labor of packing. A great deal of the packing is done in the farmers' cellars, perhaps 90 per cent of the first run, or roughing operation. In the case of the petitioners, the Idaho Potato Growers, Inc., the ownership in the potatoes remains with the grower at all times, even after shipment, and up to the time of sale. Under this method of handling, very often employees working on the farms assist the crews in sorting and sacking potatoes and very often the same employees that planted, cultivated, and dug the potatoes assist in sorting the same. Under this system, the farmer has control over the method or manner in which the potatoes are sorted and sacked, even though they are sorted and sacked in the packer's warehouse.

The sorting and sacking of potatoes is a simple operation, with all employees of the crew receiving the same rate of pay except the head sorter, who usually receives five cents per hour additional. Most farmers in the past and at the present time own their own sorting tables and equipment and the sorting that was formerly done exclusively by the farmer on his farm is the same as is now being done by the packers and the farmers in the warehouses. Practically the only difference in the various jobs on the sorting table is the strenuousness or the weight of the job. Otherwise, the jobs are all unskilled and may be performed by anyone, and they are particularly adapted to farm labor.

SPECIFICATION OF ERRORS RELIED UPON

I

Petitioners specify that the Board erred in affirming the rulings made by the Trial Examiner wherein the Trial Examiner found as a fact that the employees of the petitioners, with the exception of the Idaho Traffic Association, were not employed as agricultural laborers. The Board erred in refusing to grant the petitioners' motion to dismiss on the grounds that the employees were employed as agricultural laborers.

II

Petitioners specify that the Board erred in affirming the rulings made by the Trial Examiner wherein the Trial Examiner found as a fact that the employees Willard Moore (L. S. Taube and Co.) and Milo Rash (Idaho Potato Growers Association, Inc.), were discharged for union affiliation and that the union was discriminated against thereby.

III

Petitioners specify that the Board erred in affirming the ruling made by the Trial Examiner wherein the Trial Examiner found as a fact that the petitioners were guilty of interfering with the union, whereas the interference, if any, actually came from the farmers and growers.

IV

Petitioners specify that the Board erred in entering an order against these petitioners on the 10th day of April, 1943.

ISSUES

The issues are briefly and clearly stated in the above Specification of Errors and involve the three questions: (1) Are the employees involved herein engaged as agricultural laborers? (2) May the petitioners be guilty of unfair labor practices if the same were committed by the growers and farmers or under their control? (3) Are the petitioners, L. S. Taube and Co., and the Idaho Falls Potato Growers, Inc., obliged to make the employees Willard Moore and Milo Rash whole, where the employees made no effort to return to work and where the employment was merely a seasonal or temporary layoff? Were the petitioners justified in refusing to bargain with the union until the union established its right to represent a majority of the employees?

ARGUMENT

POINT No. 1

We believe the evidence shows in this case the employees engaged in these operations to be agricultural workers.

A careful study of the results of the cases decided under the National Labor Relations Act shows that the principles enunciated therein are becoming well-established guide-posts in the field of labor relations. We do not propose to dispute those principles or suggest their reconsideration, but wish to briefly bring to the Court the problem confronting the petitioners who are engaged in the agrarian pursuit of handling and sacking potatoes for market.

Under the Statement of Facts showing how the potatoes are packed in this area we find the following pertinent incidents: (a) The packers own and operate their own farms upon which they grow potatoes that are packed, along with potatoes purchased from other growers (pp. 264, 185, 186, 263, 275, 276), (b) Most of the potatoes are subjected to a preliminary "roughing" operation in the growers' cellars and on the farms (p. 269), (c) A large number of the employees engaged in sorting and packing the potatoes are farm boys living in the community, returning to the farms when the packing season is over (p. 231), (d) The potatoes are not changed in form and the operation of sacking and sorting is the usual simple operation performed by the farmer in preparing his product for market (p. 218), (e) Control over the method of packing the potatoes remains with the grower (pp. 226, 227), (f) Ownership in the potatoes remains with the grower until the grade is made, and in the case of the Idaho Potato Growers, Inc., until the potatoes are sold (pp. 258, 259), (g) In some instances the cost of labor in packing is borne by the grower and sometimes the crew sorting and sacking the potatoes may move from farm to farm without working in the petitioners' potato shed (p. 257), (h) All of the packing is done within a very small agricultural area of production adjacent to the farms.

"Agricultural labor" as defined by the U.S. Department of Agriculture is as follows:

> "* * * AGRICULTURAL LABOR. The term 'agricultural labor' includes all services performed

"(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connecnection with raising or harvesting any agriculrural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

"(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane if the major part of such service is performed on a farm.

"(3) In connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

"(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity: but only if such service is performed as an incident to ordinary farming operations, or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing,

or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards."

The above definition, as interpreted by the Social Security Board, would consider the employees involved in this case as "agricultural labor," and they have so ruled. Numerous state unemployment insurance laws would likewise consider these employees "agricultural labor" and the Victory Tax follows the rule adopted by the Social Security Board.

In narrowing down the question of what is "agricultural labor" we come to these significant questions:

(1) Does the farmer-grower own the product that is being prepared for market?

(2) Is the preparation for market the usual method used by a farmer-grower?

(3) Has the form or content of the product remained the same in preparation for market?

(4) Is the work incidental to and a regular part of farming, harvesting and preparing the product for market?

(5) Does the grower-farmer have control over the product and the manner in which it is pre-

pared for the market, and is the preparing for market done in such close proximity to the farm that it can be controlled and supervised by the farmer-grower?

(6) Does the grower-farmer pay the labor?

Referring to the above six questions, an affirmative answer is supported by the evidence in this case. The only two questions that might cause some debate are numbers four and six. Number four asks, "Is the work incidental to, and a part of a normal farming operation?" No one can dispute the fact that the work of sacking potatoes is a simple manual farming operation which would either be performed by the farmer or his hired man, and we believe the job of sacking potatoes is an incident to the growing, cultivating and harvesting of the same, inasmuch as the product must be sacked before it is marketed.

If we compare this operation with the harvesting of wheat, or the making of hay, the analogy is clear. Certainly sacking wheat or shoveling it into wagons is an incident to its preparation for market. The stacking of hay is an incident to its preparation for market. These are the usual, customary, and necessary actions of the grower.

The answer to question number six, "Does the farmer pay for the labor costs?" may cause some question. We believe the evidence in this case supports an affirmative answer (pp. 231, 232, 257). The witnesses all testified that the grower-farmer paid the bill for labor in all cases, either in the price that he received for his product, and in the case of the Idaho Falls Potato

Growers, Inc., the testimony shows that the farmer sometimes paid the bill for labor personally, or he was charged the exact amount of the labor by the Association.

The Supreme Court of the State of Idaho has passed on this question in three different types of cases within the last two years, and in each instance has followed the logical trend of authorities and has clearly determined that the confusion now existing can be cleared away by applying the true test to the laborer, "Is the work performed by the laborer 'farm labor'?"

In the case of Carstens Packing Company, a corporation, versus Industrial Accident Board (63 Idaho 613, 123 Pac. (2d) 1001), the Court stated:

> "In deciding whether one employed to assist in fattening feeder livestock is, in so doing, performing agricultural labor, within the meaning of the Unemployment Compensation Law, the nature of the service rendered is controlling—not the means by which the employer acquired title to the livestock."

and again in the same decision, we find this statement:

> "One employed to feed livestock, to prepare it for market, is engaged in agricultural labor, within the meaning of the Unemployment Compensation Law, and, in order that his labor be so classified, it is not necessary that it be performed on tillable farm land. In Smythe vs. Phoenix, above cited, we said: 'The fact appellant himself did not breed and raise the lambs would not detract from the

> feeding and fattening as being agricultural. Respondent herein was engaged in an agricultural pursuit upon the nine acres constituting the appellant's feed lot as much as if the nine acres had been a part of any one of appellant's farms. All of the work performed for him by respondent was incidental to and a necessary part of fattening sheep for market, appellant's sole purpose as disclosed by the record, and thus exactly similar to any other livestock employer. Until they were properly fattened the lambs were not a completed range or farm product at least for slaughtering purposes."

In the above case the Carstens Packing Company, a corporation, employed laborers to feed and fatten sheep for slaughtering and the work performed was on acreage used for that purpose only.

In the case of the Big Wood Canal Company versus the Unemployment Compensation Division of the Industrial Accident Board, 63 Idaho 785, 123 Pac. (2d) 15, the Court again held that employees working for the corporation and assisting in the operation of canals, ditches, flumes and laterals for the delivery of water to the farmers, were agricultural labor, the Court stating:

> "* * * it is safe to assume that the members generally (referring to the 1939 Legislature), if not unanimously, knew and understood that substantially the whole of southern Idaho is arid in its native state; and that the growing of agricultural crops in all this vast region is impossible without

the artificial application of water. It is just as essential to have canals, ditches, flumes, and laterals for the delivery of water to the land, as it is to have the land in order to grow the crops.

"* * * The fact, that the Big Wood Canal Company employs and pays men who tend and maintain the reservoirs and canals, and measure and deliver the water to the farmers, renders them no less laborers in the interest and field of agriculture, since the entire maintenance and operating expense is charged up to and prorated among the various farms and tracts of land to which the water is delivered as an appurtenance."

And once again in the case of P. G. Batt versus Unemployment Compensation Division of the Industrial Accident Board, 63 Idaho 572, 123 Pac. (2d) 1004, the Court held that employees engaged in packing lettuce or sacking potatoes are agricultural laborers even though the products packed are either purchased or consigned or grown by the packer himself, the Court in the Batt case stated as follows:

"It appears from the stipulation of facts, and is admitted that this so-called *processing* merely consists of sorting, washing and grading these several farm products and packing or crating them for shipment and market. It is further stipulated and found as a fact, that the same laborers do the work on both the purchased and the consigned products; and that the work is identical on both.

"It is clear that the appellant does, for hire, just such work as the farmer would have to do himself

or hire someone else to do, on the farm or elsewhere, in preparation of his products for market. For this labor, the appellant received and deducted from the sale price 'the expenses including a charge for processing and a brokerage charge,' and paid the balance to the farmer. It further appears that all culls and unsalable portions of the products consigned were returned to the owner, after the so-called processing was completed.

"I fail to see wherein the work done upon consigned products is any less 'agricultural labor' than that done upon the same kind of products purchased by appellant or grown by him on his own farm. It was all *agricultural labor*."

This same opinion was rendered in a fourth case, Walter Richard Smythe versus W. G. Phoenix, 63 Idaho 585, 123 Pac. (2d) 1010. In this, the Court states as follows:

"Cases which have held in line with the thought that the work engaged in by appellant here was of an agricultural nature bringing it within the exemption clause of the unemployment statute are: Holmes vs. Travelers Ins. Co. (Tex.), 148 S.W. (2d) 270, in which a dairy farm employee feeding cows was held to be engaged in an agricultural pursuit. Other cases holding employees on dairy farms were engaged in agriculture are Hardy vs. Gapen (Pa.), 14 Atl. (2d) 892; Application of Butler, 16 N.Y.S. (2d) 965; Keeney vs. Beasman, 169 Md. 582, 182 Atl. 566. Hauling garbage to feed pigs was held farm labor in Halletz vs. Wise-

man, 183 N.Y.S. 112. Feeding and caring for poultry was held to be farm labor in Bennett vs. Stoneleigh Farms, 4 N.Y.S. (2d) 255. An employee on a demonstration farm operated by a creamery on which turkeys, hogs, and cattle were raised was held to be a farm laborer in Hebranson vs. Fairmont Creamery, 187 Minn. 260, 245 N.W. 138."

When the six questions above propounded are answered in the affirmative, we all agree that the work performed in preparing potatoes for market is "agricultural labor." However, in a number of cases, particularly the North Whittier Heights Citrus Association case, 10 N.L.R.B. 1269, 109 F. (2d) 3681, and the Great Western Mushroom Company vs. Industrial Commission, 103 Colorado 39, 82 Pac. (2d) 851, the Courts based their decisions on the theory that the determining factor is who employs the laborer rather than what is the work performed by him.

We believe that the cases adopting the theory of the North Whittier Heights case can be distinguished from the instant case because of the type of work that was being done and because in those cases the work was all performed off the growers' premises, title to the product changed and control over the method of packing was released, and because it required a higher degree of skill than sorting and sacking potatoes, by the use of machines and equipment, and skilled migratory labor.

The true test or proper definition of "agricultural labor" should contemplate the actual work performed (services customarily performed by a farm hand) and

not necessarily where the work is performed, or by whom paid.

The employees rendering the services in the present case are performing services mandatory and necessary in the marketing of products and they are the same, identical services performed by the growers and farmers whenever the farmer sells his own crop.

The services are exactly the same regardless of where they are performed. In United States vs. Turner Turpentine Co., 5 Cir. 111 F. (2d) 400, 404, the Court, in discussing the term "agricultural labor" under the Social Security Act (42 U.S.C.A. 1011) remarked:

> "* * * When then, Congress, in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor,' it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the Act operates. This does not mean, of course, that a mere local custom which is in the fact of the meaning of a general term used in an act, may be read into the act to vary its terms. It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to."

From the foregoing authorities, it may be stated that the word "agriculture" is very broad in scope, that "farming" is a species of the general term "agriculture," and that the preparation of potatoes on a farm, or adjacent thereto, for market, is agricultural labor.

Supposing potato packing work is done partially in a packing house, as in the instant case, would this transfer in work-place correspondingly change the label "agricultural labor" to something else?

Clearly, the statement in the act refers to the kind or character of the work performed and not to the place of its performance.

The important question is: What is the character or nature of the work?

We interpret the language in the statute as words describing "services customarily performed." Hence, instead of the Act referring to the place of performnace, it merely described the type of service—the nature of the work—coming within the term "agricultural labor." The prepositional phrase, "on a farm" adds merely to the general description of the nature of the services. The legislature did not intend that the statute should define agricultural labor in a limited or confined sense, especially when it employed the comprehensive term "agricultural" and used the indefinite article "a" rather than the definite article "the."

> "'The' is the word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of 'a' or 'an.' (United States vs. Hudson (D.C. 65 F. 68, 71. 1 Words and Phrases, Perm. Ed., 1.)"

Section 3(f) of the Fair Labor Standards Act of 1938 also exempts "agricultural labor," and we believe the real intent of Congress in passing both the National Labor Relations Act and the Fair Labor Standards Act was to exempt employees engaged as "agricultural" laborers, and it is made quite plain in the latter act that the actual test is, "What does the employee do—does he handle products from the farm in their raw and natural state, or is he engaged in a first-processing operation, and is he within the area of production." These are the tests that are significant and determinative. The employee's status is not determined by his place or manner of employment, but more logically, by what he does.

The cases decided under the Wage and Hour Law indicate the trend away from the theory of the North Whittier Heights case and toward a more sensible position of using the test of what the employee does.

The Court has held that employees in a nursery, where the work consists of receiving, handling, packing, trucking and selling of nursery stock, are "agricultural." Walling vs. Rocklin, et al., U.S.C.A. 132 F. (2d) 3, 44 F. Supp. 355.

We believe the case of National Labor Relations Board vs. Stark Brothers (1942, 40 N.L.R.B. 221) strengthens the position that the real question should be, "what does the employee do?" the Board in this case stating:

> "* * * We are of the opinion that while the conduct of a nursery such as the respondent's is both a commercial and an agricultural operation,

> the employees here involved are agricultural laborers within the meaning of the Act. In this regard it is to be pointed out that nursery employees have consistently been held to be agricultural laborers under the Fair Labor Standards Act, as administered by the Wage and Hour Division of the Department of Labor."

Further on, in the same opinion, we find the following statement:

> "* * * We are of the opinion, moreover, that the controlling fact in construing the term 'agricultural laborer' is the essential character of the work performed, which, as we have stated, is here primarily connected with the growing of crops and nursery stock. We are accordingly constrained to find that the exclusion of 'agricultural laborers' in Section 2(3) of the Act applies to an indeterminate number of the respondents' employees involved in this case, and that the Board, therefore, is without jurisdiction to include such workers in a unit for the purposes of collective bargaining."

In a Second Circuit Court of Appeals decision at Kansas City, the Court held that the agricultural exemption applied to employees in a commercial chicken hatchery, located in a city, and selling its baby chicks. Miller Hatcheries, Inc., vs. Boyer, 131 F. (2d) 283.

In some unreported cases under the Fair Labor Standards Act, this trend seems quite clearly established. In the case of Dye vs. McIntyre Floral Co. (1

W.H. Cases 1150), the Court held that employees in a nursery were engaged in agricultural labor within the meaning of the Fair Labor Standards Act. Hampton vs. Marshall, U.S. Dist. Court, Northern District of Texas (1 W.H. Cases 729). An employee guarding a warehouse storing cotton was considered "agricultural." In the case of Anderson vs. Meacham (1 W.H. Cases 1012) the Court held an employee assisting in the grinding and sacking of meal in a grist mill engaged in agricultural labor.

The test in these cases is not the place of performance, but the character and nature of the performance. This is clearly illustrated by Davis vs. Industrial Commission of Utah (59 Utah 607, 206 Pac. 267, 269). Claimant was engaged by a farmer to herd sheep in the public domain. His claim for injuries was denied on the ground that the Utah Industrial Act excepted "agricultural labor."

> "* * * In upholding denial of compensation, the Court stated: 'The applicant for compensation herded sheep for his employer on the public domain. If he was an agricultural laborer when herding on the owner's ranch, the fact that the sheep were herded elsewhere would not remove him from this class of labor. If raising stock on a small farm is agriculture, raising stock on a large ranch is the same; and if raising and caring for sheep on the owner's premises is agriculture, the laborer's avocation is not changed by the sheep being pastured and herded elsewhere, whether on the public domain or not."

> "The crux of the question is whether or not the fact that these services are rendered off the farm by organizations performing the service for the farmer on a customs basis changes the services from agricultural labor to something else."

In the final analysis, the question that must be decided by this Court is whether the true test shall be the nature of the work performed by the employee, the control over his activities and the area within which he works and not by whom he is hired or the number of employees involved. The present case can be distinguished from the North Whittier Heights case: *first,* on the ground that the employees in this case do a great deal of the work in the farmers' cellars and on the farmers' premises; *second,* the work is not as skilled or technical and does not require the machinery, as does the packing of fruit, and *third,* some of the potatoes packed by these employees are grown by their employer, and *fourth,* the ownership of the potatoes and control over their packing remains with the grower.

We do not believe the Court can distinguish and divide the employees in this case. Some are working for a non-profit, cooperative association; some for the owners of large farms and tracts of land; and some for just packers packing both their own potatoes and those of others. To try to distinguish and divide would only add to the confusion and not clarify the problem. We can not say they are all agricultural while on the farm and something else when off the farm. If, on the other hand, the Court will apply the tests as urged by the

petitioners and affirmed in the cases above cited, the legislative intent will be supported by the decision and the nature of the services performed will become the true test and the employees involved herein declared agricultural labor.

POINT No. II

We believe that any violation of the National Labor Relations Act that may have occurred herein was caused by the activities and actions of the growers and farmers, and not these petitioners; that this entire problem is one involving agricultural labor on or in the vicinity of the farm.

Under Point No. 2, we raise two defenses: *first,* we do not believe as employers we are obliged to bargain with the union unless it established its right and gives us proof of the same. *Second,* the independent actions by the farmers and growers, serving notice they would not supply potatoes if petitioners dealt with the union, prevented us from bargaining during the period covered by this ultimatum (p. 445).

Considering the first defense, we refer to petitioners letter dated March 16, 1942 (pp. 315-316) wherein petitioner suggested that the union establish their right to bargain for the petitioners' employees.

The second defense is apparent to anyone who knows the temper and attitude of a group of irate Idaho farmers who are asked to produce and work day and night for the war effort and see any possibility of interference. These farmers meant what they said to the petitioners.

POINT No. III

We believe the petitioners were justified in refusing to bargain with the union unless or until the union could prove representation of a majority of the employees.

Bargaining in good faith by the petitioners at the beginning of the new season in September, 1942, absolved petitioners of any acts or charges alleged by the union for the spring season ending April 15, 1942 (p. 450).

By custom and practice the petitioners employ new and different crews from season to season with no obligation to re-hire the same group; however, a great many of the same employees do return to the same employers from season to season.

When the spring season closed in 1942, very little headway had been made toward negotiations but with the new season starting in September, 1942, it is admitted by all concerned that bargaining in good faith and in a sincere manner was in progress (pp. 385, 450). The petitioners contend that this meeting of minds and negotiations between the parties absolved the petitioners of any charges or acts that may have been committed prior to the meetings and that this was understood and contemplated by the Union during these meetings.

POINT No. IV

We believe the employees, Milo Rash (Idaho Potato Growers, Inc.) and Willard Moore (L. S. Taube and Co.), were lawfully and temporarily laid off due to lack of work and

their own inefficiency. These employees made no effort to return to discuss further employment or to improve their status as employees.

The offer by the employer to reinstate employees Milo Rash and Willard Moore and the refusal of these employees to come back to work, relinquishes any liability on the part of these petitioners (pp. 696, 697, 700, 704, 708).

In the case of the Idaho Falls Potato Growers, Inc., the employee Milo Rash was offered reemployment by a head sorter, or crew foreman, and Rash refused the offer by claiming he would be overworked. There is no evidence in the record that Rash would be overworked or placed in any different position from the others; in fact, the testimony of all witnesses seems to be all of the jobs on the sorting machine were practically the same and that the employees changed positions from time to time merely to relieve the monotony of the work.

We believe that Milo Rash should have accepted reemployment and that he had no legal right to anticipate mistreatment, and we believe further the petitioners' liability, if any, ceased when Rash refused to go back to work.

In the case of the employee, Willard Moore, Willard discussed the situation with his employer shortly after his layoff and the employer suggested that he come over and discuss the subject, and although Moore agreed to do so, he never came back, and thereby prevented the employer from reinstating him when the work was available (p. 672).

In the case of the petitioners, L. S. Taube and Co., employers of Willard Moore, the evidence shows that employees are laid off from time to time, depending upon the available work; that by custom and practice the employees come back and ask for their jobs or keep in close contact with the employer for available work.

In the case of Willard Moore, the employer suggested that he return and discuss the matter. The evidence shows that Moore never applied for his old job, nor would he come over at the request of the employer (p. 672). We do not believe there is any evidence to support the charge that this employer discriminated against the employee Willard Moore.

Dated at Boise, Idaho, this.....day of of February, 1944.

Respectfully submitted,

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